



December 7, 1999

Mr. Jack Ingram
Associate General Counsel
Texas Department of Transportation
Dewitt C. Greer State Highway Building
125 E. 11th Street
Austin, Texas 78701

OR99-3543

Dear Mr. Ingram:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 130267.

The Texas Department of Transportation (the "department") received a request for certified payroll records and asphaltic concrete mix designs from a highway construction project currently being undertaken by Gilbert Texas Construction Corporation ("Gilbert"). You indicate that you have already made available for inspection the concrete mix designs.¹ Therefore, we will consider only the claims you raise that are related to the certified payroll records. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. You have submitted a representative sample of the certified payroll records.²

The Seventy-sixth Legislature now requires a governing body to provide notice to a third party when a request is received which may implicate the third-party's privacy or property interest. Act of May 25, 1999, 76th Leg, R.S., ch. 1319, §24, 1999 Tex. Sess. Law Serv.

¹You have noted that the concrete mix designs may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. See Open Records Decision No. 550 (1990).

²In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988); 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

4500, 4510 (Vernon) (to be codified as an amendment to Gov't Code § 552.305). The department met its statutory burden under section 552.305 by providing Gilbert the required information by letter dated October 13, 1999. Gilbert had the opportunity to submit to our office within 10 business days after receiving the department's notice the reason or reasons why the information should be withheld and a letter, memorandum, or brief in support of the proffered reasons. Act of May 25, 1999, 76th Leg, R.S., ch. 1319, §24, 1999 Tex. Sess. Law Serv. 4500, 4510 (Vernon) (to be codified as an amendment to Gov't Code § 552.305(B)); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). This office has received a response from Gilbert, raising additional claims that the information is excepted from disclosure. We will first consider Gilbert's claims.

First, Gilbert asserts that all of the information in its payroll records are excepted from disclosure pursuant to section 552.101 of the Government Code. However, Gilbert has not specifically identified a constitutional provision, statute, or judicial decision which makes the information confidential by law. Accordingly, we do not agree that the information is excepted from disclosure under section 552.101. Therefore, the payroll records may not be withheld in their entirety under section 552.101.

Next, Gilbert claims that the payroll information is confidential under section 552.110 of the Government Code because it is "the construction industry's equivalent of a trade secret." The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which defines a "trade secret" as

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), cert. denied, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that

rebutts the claim as a matter of law. Open Records Decision No. 552 at 5 (1990).³ After reviewing Gilbert's arguments, we conclude that Gilbert has not established that its proposal information is protected as a trade secret under section 552.110. See Open Records Decision No. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Thus, you may not withhold the requested information under the trade secret prong of section 552.110.

Gilbert has additionally asserted that the certified payroll is excepted from disclosure pursuant to section 552.104 of the Government Code. Section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the department does not raise section 552.104 this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by governmental body). Therefore, the requested information may not be withheld under section 552.104.

Finally, Gilbert claims that section 552.102 of the Government Code excepts the submitted payroll information from required disclosure. Section 552.102 protects the privacy interests of current and former employees of governmental bodies, not third parties. Gov't Code § 552.102(a). Therefore, it is incumbent upon the governmental body to raise this exception to disclosure. As the department does not raise section 552.102, this section is not applicable to the requested information. Thus, the requested information may not be withheld under section 552.102.

We now address the exceptions to disclosure claimed by the department. The department urges that information in the certified payroll records is exempt from disclosure pursuant to Government Code section 552.101. The department asserts that the names and social security numbers of Gilbert's employees are excepted under common-law privacy. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception applies to information made confidential by the common-law right to privacy. *Industrial Found. v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that release of the information would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *Id.* Financial information concerning an individual is in some cases protected by a common-law right of privacy. See

³The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Open Records Decision Nos. 545 (1990), 523 (1989). However, the disclosure of a person's name is not an invasion of privacy. Open Records Decision Nos. 554 at 2 (1990), 532 (1989), 169 (1977). Similarly, a previous opinion of this office determined that social security numbers are not protected by the common-law privacy doctrine. Open Records Decision No. 169 at 8 (1977). Therefore the department may not withhold the names and social security numbers of the Gilbert employees on this basis.

However, the social security numbers may nonetheless be confidential. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the payroll are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Public Information Act on the basis of that federal provision. We remind you, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

Additionally, the department asserts that the submitted information is commercial or financial information which is excepted from disclosure pursuant to section 552.110 of the Government Code. Section 552.110 protects the property interests of private parties by excepting from disclosure commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained is excepted from the requirements of section 552.021. In order for information to be excepted from disclosure under the commercial or financial information prong of section 552.110, the governmental body or interested third party must provide a specific factual or evidentiary showing, not a conclusory or generalized allegation, that substantial competitive injury would likely result from disclosure. Act of May 25, 1999, 76th Leg., R.S., ch 1319, § 7, 1999 Tex. Sess. Law Serv. 4500, 4503 (Vernon) (to be codified as an amendment to TEX. GOV'T CODE § 552.110); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Neither the department nor Gilbert has provided specific factual evidence that disclosure would cause Gilbert substantial competitive harm. Therefore, the payroll records at issue may not be withheld under the commercial or financial information prong of section 552.110. Accordingly, the department must disclose the submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Carla Gay Dickson
Assistant Attorney General
Open Records Division

CGD/ch

Ref: ID# 130267

Encl. Submitted documents

cc: Mr. Sam Joiner
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(w/o enclosures)